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No. 21,918

In the United States Court of Appeals for the Ninth Circuit

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

E-Z DAVIES CHEVROLET, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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v.

E-Z DAVIES CHEVROLET, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*),[1] for enforcement of its order (R. 83-95),[2] issued on November 30, 1966, against respond-

[1] The pertinent statutory provisions are reprinted in Appendix B, *infra* pp. 28-30.

[2] References designated "R." are to Volume I of the record as reproduced pursuant to Rule 10 of this Court. References

ent (hereafter also the "Company"). The Board's decision and order are reported at 161 NLRB No. 121. As the Board's order is based in part on findings made in a representation proceeding under Section 9 of the Act, the record in the representation proceeding is part of the record before the Court pursuant to Section 9(d). This Court has jurisdiction of the proceedings, the unfair labor practices having occurred at Redwood City, California, within this judicial circuit. No jurisdiction issue is presented.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

The Board found that the Company violated Sections 8(a)(5) and (1) of the Act by refusing to recognize and bargain with a union which had been duly elected and certified as the bargaining representative of an appropriate unit of the Company's employees. The facts underlying the Board's findings are set forth below.

A. *The representation proceeding*

The Company is a new and used car-truck dealer in Redwood City, California. On June 21, 1965, the

designated "Tr." are to the reporter's transcript of the testimony in the underlying representation proceeding as reproduced in Volume II of the record. References designated "B.X." or "E.X." are to exhibits of the Board and respondent, respectively, submitted in the representation proceeding. Whenever in a series of references a semicolon appears, those references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

Union[3] filed an election petition seeking to represent a bargaining unit comprised of the Company's salesmen (R. 4). At the pre-election hearing, the Company moved to dismiss the election petition on the ground that the single-employer unit was inappropriate. The Company asserted that the only appropriate unit in which the salesmen could be represented was a multiemployer unit consisting of all salesmen employed by the employers in an employer association of which the Company was a member (Tr. 6). The following facts were developed at the hearing:[4]

The Company is a member of Peninsula Automobile Dealers Association ("PADA") and the California Association of Employers ("CAE"). Since 1953, PADA (through CAE conducting negotiations on PADA's behalf) has bargained and contracted with Lodge No. 1414 of the International Association of Machinists[5] as the representative of a multiemployer unit consisting of the mechanics and repairmen employed by the Company and other members of PADA. Since 1953 PADA has similarly bargained with Local

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[3] Professional Automobile Salesmen, Drivers and Demonstrators, Local No. 960, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[4] The Union had also filed election petitions to represent, in separate single-employer units, two additional members of the association, namely, Carl Simpson Buick, Inc., and Fairway Chevrolet. The three petitions were consolidated for hearing and decision (R. 5). All three employers, represented by the same counsel, moved to dismiss the respective petitions on the unit ground set forth above.

[5] Peninsula Auto Mechanics Lodge No. 1414, International Association of Machinists.

No. 665 and Local No. 576 of the Teamsters Union,[6] as bargaining representatives of the remaining shop employees of PADA's members (R. 14; Tr. 6-21, 24-31, E.X. 1-6).

In 1953, also, Local 775 of the Retail Clerks Union[7] was designated as the bargaining representative of the salesmen employed by the Company and other members of PADA. This bargaining relationship, however, expired when no collective bargaining contract could be agreed upon. In 1958, Local 576, Teamsters, who, as shown above, represents part of the shop employees, was designated as the bargaining representative of the salesmen employed by PADA's members. Again, however, PADA and the salesmen's representative could reach no collective bargaining agreement. Thus, when the Union filed the instant election petition to represent the Company's salesmen in a single-employer unit, neither they nor other salesmen employed by PADA's other members had ever been covered by a multiemployer contract between PADA and any labor organization (R. 14; Tr. 22-23).

On the basis of these facts,[8] the Regional Director determined that the Company's salesmen constitute an

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[6] Garage & Service Station Employees' Union, Local No. 665, International Brother of Teamsters, Chauffeurs, Warehousemen and Helpers of America; and, Automotive Workers Union, Local No. 576, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[7] Local 775, Retail Clerks International Association, AFL-CIO.

[8] Other evidence introduced at the pre-election hearing bore on questions of individual employee unit inclusion, which are no longer in issue.

appropriate bargaining unit; he rejected the Company's contention that the Company's salesmen could be appropriately represented only in a multiemployer unit comprised of the salesmen of all PADA members. Accordingly, the Regional Director denied the Company's motion to dismiss the petition, and directed an election in a unit comprised of the Company's salesmen (R. 13-16). The Company filed a Request for Review with the Board, which denied the request on September 3, 1965, thereby affirming the Regional Director (R. 17-26).

The salesmen selected the Union (R. 27). The Company filed objections seeking to set aside the election. The Company asserted that the Union's use of an election observer, who was a Union official and also an employee of another employer, prevented a free election (R. 28-29). The Regional Director conducted an administrative investigation of the Company's objection, which showed the following:

The Union selected Wallace L. Banner, Jr. as its election observer. Banner is an elected vice-president of the Union, and receives $50.00 per month for expenses but no salary. Banner is a full-time automobile salesmen employed by an automobile dealer in San Francisco whose salesmen are represented by the Union. The Board agent conducting the election permitted Banner to serve as the Union's observer over the Company's opposition. No claim was made that Banner engaged in any improper conduct during the polling; he wore no insignia other than his official

observer's badge; he did not speak to the voters during the election (R. 30-31).

On the basis of the above facts, the Regional Director concluded that Banner's performance as the Union's observer did not prevent a free election, and overruled the Company's objection. Accordingly, the Regional Director certified the Union as the representative of the Company's salesmen (R. 31-33). The Company filed a Request for Review with the Board (R. 34-38), which was denied on January 24, 1966 (R. 41). A request for reconsideration was also denied (R. 43-44, 46).

B. *The unfair labor practice proceeding*

When the Union sought recognition and bargaining, the Company refused, and did not reply to the last of the Union's several requests (R. 39-40, 42, 45, 47). The Union then filed charges, and a complaint issued alleging refusal to bargain in violation of Section 8(a)(5) and (1) of the Act. The Company answered, in the form of a general denial of the commission of unfair labor practices (R. 48-49). As no issues had been raised requiring a hearing before a trial examiner, the General Counsel moved the Board to grant summary judgment against the Company. Orders were granted transferring the proceeding to the Board and directing the Company to show cause, in writing, why the motion for summary judgment should not be granted (R. 60-74). The Company filed a response in which it asserted that the Board had no authority to grant a motion for summary judg-

ment, and could not rule on the complaint until after a hearing and the opportunity to call witnesses and introduce evidence (R. 76-81).

II. The Board's Conclusions and Order

The Board granted the motion for summary judgment, holding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and to bargain with the Union after it had been duly elected and certified as the bargaining agent in an appropriate unit comprised of the Company's salesmen. The Board rejected the Company's assertion that it was improperly being denied an evidentiary hearing on the complaint. The Board noted that the Company refused to recognize the Union in order to obtain court review of the election and certification, and that in such circumstances it is well settled that issues which were or could have been raised in the representation proceeding may not be relitigated in the unfair labor practice proceeding, unless the employer has newly discovered or previously unavailable evidence to introduce. The Company offered no such evidence. Accordingly, a hearing on the complaint was not required and, the Company having admittedly refused to recognize the certified representative of a unit of its employees, summary judgment was proper (R. 82-91).

The Board's order directs the Company to cease and desist from the unlawful conduct found, to bargain with the Union upon request, and to post the usual notice (R. 91-95).

ARGUMENT

The Board Properly Found That Respondent Violated Section 8(a)(5) and (1) of the Act by Refusing to Recognize and to Bargain With a Union Which Had Been Duly Elected and Certified as the Bargaining Representative of an Appropriate Unit of Respondent's Employees

The Company's conceded refusal to recognize and to bargain with the Union, after it was elected by the Company's salesmen and certified by the Board, violated Section 8(a)(5) and (1) of the Act unless, as the Company asserts, the election and certification were invalid. We show below that this assertion has no merit. We further show that the Board did not commit any procedural error in granting the General Counsel's motion for summary judgment.[9]

A. *The Board properly found that the Company's new and used car-truck salesmen constitute an appropriate bargaining unit*

Section 9(b) of the Act provides that "the Board shall decide in each case whether, in order to secure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for collective bargaining shall be the employer unit,

[9] As set forth, *supra* p. 3 n. 4, in a consolidated representation proceeding three elections were held; in two, the employees of the Company and Carl Simpson Buick, Inc., selected the Union. Simpson asserts error in the representation proceeding and in a subsequent unfair labor practice proceeding on the identical grounds raised by the Company. *N.L.R.B.* v. *Carl Simpson Buick, Inc.*, No. 21887. After filing of briefs the Board will move for consolidation of the cases for argument.

craft unit, plant unit, or subdivision thereof" (*infra* pp. 28-29). Before the Board the Company made no contention that its automotive salesmen do not constitute a distinct, homogenous group which traditionally has been held an appropriate bargaining unit. See *Lownsbury Chevrolet Company*, 101 NLRB 1752; *Weaver-Beatty Motor Co.*, 112 NLRB 60; *N.L.R.B.* v. *McCarthy Motor Sales Co.*, 309 F. 2d 732, 733 (C.A. 7). In finding such a unit permissible here, the Board applied its oft-repeated and judicially approved rule that absent a controlling history of bargaining on a broader basis, a single-employer unit is presumptively appropriate. *N.L.R.B.* v. *American Steel Buck Corp.*, 227 F. 2d 927, 929-930 (C.A. 2), enforcing 110 NLRB 2156, 2160; *Bull Insular Line, Inc. et al.*, 107 NLRB 674, 682; *Pearl Brewing Co.*, 106 NLRB 192, 193; and see *Joseph E. Seagram & Sons*, 101 NLRB 101, 103. The Board properly rejected the Company's claim that, nonetheless, its salesmen could only be represented as part of a multiemployer unit.

Unit determinations are particularly within the responsibility and wide discretion of the Board. The agency's unit direction is "rarely to be disturbed" (*Packard Motor Co.* v. *N.L.R.B.* 330 U.S. 485, 491), and "will not be set aside in the absence of a showing that such determination was arbitrary and capricious." (*N.L.R.B.* v. *Merner Lumber Co.*, 345 F. 2d 770, 771 (C.A. 9), cert. denied, 382 U.S. 942). Accord: *N.L.R.B.* v. *Moss Amber Mfg. Co.*, 264 F. 2d 107, 110-111 (C.A. 9); *N.L.R.B.* v. *Krieger-Ragsdale & Co.*, 379 F. 2d 517, 519-520 (C.A. 7). Arbitrariness

and capriciousness in the instant case, asserted the Company, are shown by the following factors (see R. 17-26): the Company is a member of an association of automobile dealers (PADA) in the greater San Francisco area, which is authorized to bargain collectively for its members; during the last 15 years the Board has certified unions to represent the members' shop employees in multiemployer units; PADA has bargained with these unions on a multiemployer basis and entered into associationwide collective bargaining agreements on behalf of the Company and other members; when the Union filed its election petition to represent the Company's salesmen in a single-employer unit, there were current multiemployer agreements covering the shop employees; and, during this 15 year period the Board successively certified two unions as the representative of the members' salesmen in a multiemployer unit, albeit on each occasion the bargaining relationship did not subsist for failure of PADA and the union to agree to a contract covering the salesmen (see *supra* pp. 3-4).[10]

The above factors, however, scarcely demand a conclusion that the Company's salesmen may now exer-

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[10] The Company's salesmen have apparently been allowed to participate in a health and welfare program set up in a trust agreement negotiated between PADA and unions representing shop employees in multiemployer units (R. 21-22; Tr. 30, E.X. 5). The Company put misplaced reliance on this factor. The voluntary extension of employment benefits to employees outside a multiemployer unit bears little on unit considerations and may not control the Board's unit determination. See, *N.L.R.B.* v. *Friedland Painting Co.* 377 F. 2d 983, 987 (C.A. 3).

cise the right to bargain collectively only if grouped in a multiemployer unit. The Company's insistence on the inappropriateness of single-employer bargaining was premised on the past and current history of multiemployer bargaining concerning other employee groups. This history, however, does not automatically crystallize the bargaining pattern for *all* of the employees of the Company and other PADA members. The collective bargaining history of the particular employees sought to be represented is the central relevant factor. It is well within the Board's discretion to permit single-employer bargaining for the unrepresented employees of employers who otherwise participate in multiemployer bargaining. *N.L.R.B.* v. *American Steel Buck Corp.*, *supra.* Compare, *N.L.R.B.* v. *Local 210, Teamsters*, 330 F. 2d 46 (C.A. 2). A different result was not dictated here by the two occasions during which the Company's salesmen were unsuccessfully represented on a multiemployer basis. The Board, in furtherance of employee rights, looks for a *successful* bargaining history. Here, as in *Lownsbury Chevrolet Company*, *supra*, a "sporadic history of multiemployer bargaining for the salesmen [does not] render the [single-employer] unit sought inappropriate (101 NLRB at 1754). Moreover, the Company's salesmen were unrepresented when the Union filed its petition. The unions who once represented the salesmen did not choose to be involved in the election proceeding. Cf. *N.L.R.B.* v. *David Friedland Painting Co.*, *supra*, 377 F. 2d at 987. Hence, the Company's assertion of a *controlling* bargaining

history which should not be disrupted is without merit. "It is well settled that a single-employer unit is presumptively appropriate, and that to establish a claim for a broader unit a controlling history of collective bargaining on a broader basis by the employers *and the union involved* must exist." (emphasis supplied.) *Chicago Metropolitan Home Builders Association*, 119 NLRB 1184, 1185; *John Breuner Co.*, 129 NLRB 394, 396.

The cases cited by the Company support no other result. In 1953, as shown, the Board held that the salesmen employed by PADA's members could, like their other employees, be grouped in a multiemployer unit. But the Board adhered to the principles set forth above and applied here. Thus in 1953 the Board directed the multiemployer unit since the petitioning union had obtained the requisite showing of organizational interest among salesmen throughout PADA; the union was willing to represent the salesmen on the broader basis. The Board distinguished cases where "the only union seeking to represent the employees involved sought to represent them on a single-employer basis." *Peninsula Auto Dealers Association, et al.*, 107 NLRB 56, 58. See *N.L.R.B.* v. *Local 210, Teamsters*, *supra*, 330 F. 2d at 47-48. Multiemployer bargaining requires the consent of both union and employer, and in situations where the only union involved does not agree to represent employees on that basis it will not be required to do so. See, *Chicago Metropolitan Home Builders Association*, *supra*; *Cab Operating Corp.*, *et al.*, 153 NLRB 878, 879-880. Ac-

cord: *Harbor Plywood Corp., et al.*, 119 NLRB 1429, 1432; *Detroit Newspaper Publishers Association* v. *N.L.R.B.*, 372 F. 2d 569 (C.A. 6). This is the situation now, in contrast to 1953 when the petitioning union was qualified and agreed to represent PADA's salesmen in a multiemployer unit. The Board, accordingly, found that the single-employer unit sought was appropriate.

The Board, of course, must re-assess prior unit determinations upon a timely election petition.[11] Had the Board, as urged by the Company, refused to recognize the propriety of a single-employer unit of these employees, and insisted that in order to become eligible for representation they must first re-organize in a unit embracing the salesmen of every other employer-member of PADA, the practical effect would have been to deny the Company's salesmen "the fullest freedom in exercising the rights guaranteed by this Act" (Section 9(b), *supra*). For, "not many employee groups can simultaneously mount an organizing campaign among employees at [numerous] plants." *Joseph E. Seagram & Sons, Inc.*, *supra*, 101 NLRB at 103.

The Company put equally misplaced reliance on *The Los Angeles Statler Hilton Hotel*, 129 NLRB 1349, where the Board denied the union's request for single-employer units comprised of employees currently excluded from an existing multiemployer unit rep-

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[11] See, e.g., *Thalhimer Brothers, Inc.*, 93 NLRB 726, 727; *United Mine Workers, District 50* v. *N.L.R.B.*, 234 F. 2d 565, 568 (C.A. 4).

resented by another union. The Board determined that the unrepresented employees of each employer lacked "any internal homogeneity [or] cohesiveness" and, therefore, did not comprise appropriate separate bargaining units. The Board expressly distinguished cases like the instant one, where existing multiemployer bargaining for other groups of employees does not bar "single-employer units . . . composed of categories of employees such as guards, office clerical employees, and [*automotive*] *salesmen*, categories which have an internal homogeneity and cohesiveness and could therefore stand alone as an appropriate unit." (emphasis added). 129 NLRB at 1351. Cf. *Crumley Hotel, Inc., d/b/a Holiday Hotel, et al.*, 134 NLRB 113, 115-116.

The Company asserted (R. 21-22) that, particularly in view of the prior finding that a multiemployer unit was appropriate, the Union was seeking a narrower unit based on its organizing success and, therefore, the Board's unit finding was "controlled" by extent of organization within the proscription of Section 9(c)(5) of the Act. (see *infra* p. 29). It may be assumed, however, that the scope of organization was a predicate for the Union's unit selection. This would not establish that the Board's unit finding was controlled by the organizational factor. As stated by this Court in rejecting this contention: "Section 9(c)(5) . . . precludes the Board only from giving controlling weight to extent of organization. . ." *N.L.R.B.* v. *Moss Amber Mfg. Co.*, 264 F. 2d 107, 110 n. 1 (C.A. 9); see also, *Metropolitan Life Ins. Co.* v.

N.L.R.B., 328 F. 2d 820, 822 (C.A. 3), vacated on other grounds, 380 U.S. 523; *The Board and Section 9(c)(5): Multilocation and Single-location Bargaining Units in the Insurance and Retail Industries*, 79 Harvard Law Review 811, 824-825 (1966). Assuming, furthermore, that the multiemployer unit urged by the Company might still be appropriate, this would not put into question the propriety of the single-employer unit which the Union sought. There is no concept of a "more" or "most" appropriate unit. "It is not unusual for there to be more than one 'appropriate' unit. The Board may choose from among several appropriate units" (*N.L.R.B.* v. *Local 19, IBL*, 286 F. 2d 661, 664 (C.A. 7), cert. denied, 368 U.S. 820) and the grant of the narrower unit requested of itself raises no issue of improper reliance on extent of organization. *N.L.R.B.* v. *Smith*, 209 F.2d 905, 907 (C.A. 9); *General Instrument Corp.* v. *N.L.R.B.* 319 F.2d 420, 423 (C.A. 4), cert. denied, 375 U.S. 966. Accord: *Foreman & Clark, Inc.* v. *N.L.R.B.*, 215 F. 2d 396, 406 (C.A. 9), cert. denied, 348 U.S. 887. If, as here, the unit is otherwise appropriate, it is not rendered inappropriate merely because it coincides with the extent to which a union has organized. In short, here, as in the past, the Board applied the settled principle "that the Act does not compel a labor organization to seek representation in the most comprehensive grouping unless such grouping constitutes the *only* appropriate unit." *The Wm. H. Block Company*, 151 NLRB 318, 320.

Moreover, the Board may consider the fact that no labor organization is currently seeking a broader unit as an additional, and determinative, ground for permitting the narrower unit sought when, as in this case, that unit meets the relevant criteria for appropriateness. Section 9(c)(5) does not preclude consideration of the union's organizational interest where more than one unit is appropriate. The section was only intended to prohibit unit determinations which "could only be supported on the basis of extent of organization . . . [and] was not intended to prohibit the Board from considering the extent of organization as one factor, though not the controlling factor, in its unit determination." *N.L.R.B.* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 441-442; *N.L.R.B.* v. *Moss Amber Mfg. Co.*, *supra*, 264 F. 2d at 111; *N.L.R.B.* v. *Sun Drug Co.*, 359 F. 2d 408, 412 (C.A. 3); *Texas Pipe Line Co.* v. *N.L.R.B.*, 296 F. 2d 208, 213-214 (C.A. 5).

In the election proceeding the Company also asserted (R. 22-24) that here, as in *N.L.R.B.* v. *Metropolitan Life Insurance Co.*, *supra*, an issue of unauthorized reliance on extent of organization is raised by an alleged failure of the Board to explicate adequately the basis of its unit determination. *Metropolitan* involved the Board's application of a new policy, adopted after 15 years of contrary practice, which permits bargaining units of insurance agents less than statewide or companywide in scope. The Supreme Court concluded that the Board had inconsistently applied the new policy in several cases

without sufficiently giving reasons for the disparate application. The Court remanded on the ground that in these circumstances lack of explication precluded a determination of whether permissible weight had been placed on extent of organization. Here, however, the Board, noted, *inter alia*, the undisputed fact that the Company's salesmen comprise an appropriate bargaining group and, citing previous decisions, the Board's long-settled practice of not denying employees the usual right to single-employer bargaining merely because other groups of the employer's employees are represented on a broader basis (R. 14-15). In sum, the Board, as we have shown, followed unit standards consistently applied in its previous decisions. It was not incumbent upon the Board to explicate further the statutory basis for standards so well recognized. As the Supreme Court held in *Metropolitan*, "Of course, the Board may articulate the basis of its order by reference to other decisions or its general policies . . . so long as the basis of the Board's action, in whatever manner the Board chooses to formulate it, meets the criteria for judicial review" 380 U.S. at 443 n. 6. See, *N.L.R.B.* v. *Sun Drug Co., supra*, 359 F. 2d at 412; *S.D. Warren Co.* v. *N.L.R.B.*, 353 F. 2d 494, 498-499 (C.A. 1), cert. denied 383 U.S. 958. Accord: *American President Lines Ltd.* v. *N.L.R.B.*, 340 F. 2d 490, 492 (C.A. 9).

B. *The Board properly held that an employee of another employer who was a union official could act as the Union's election observer*

As shown *supra* pp. 5-6, the Union was permitted to select a union official, who was an employee of another employer, as its election observer. The Company's election objection asserting that this prevented a free election was properly rejected.[12] It is well settled that an election need not be set aside on a showing that the union's observer was an employee of another employer, and a paid union official or organizer. *N.L.R.B.* v. *Huntsville Mfg. Co.*, 203 F. 2d 430, 433, 434 (C.A. 5); *Shoreline Enterprises* v. *N.L.R.B.*, 262 F. 2d 933, 938, 942 (C.A. 5); *N.L.R.B.* v. *Zelrich*, 344 F. 2d 1011, 1015 (C.A. 5). Of course, special circumstances, e.g., improper electioneering, by such observers may prevent a free election. But as the Board noted, the Company made no claim of this nature (R. 28-38). Rather, the Company simply equated the selection of a union official with instances where the Board has not permitted supervisors of the employer to act as election observers. To be sure, the Board's general policy is to prohibit both the union and the employer from using the employer's supervisory personnel as observers. The equation which the Company makes, however, was rejected in the above-

[12] The Company asserted that the Board's summary affirmance of the Regional Director's decision overruling the election objection lacked the necessary explication. (R. 43-47). This contention has no merit. *N.L.R.B.* v. *Schill Steel Products*, 340 F. 2d 568, 574 (C.A. 5); *N.L.R.B.* v. *Air Control Products*, 335 F. 2d 245, 251 n. 26 (C.A. 5).

cited cases. The courts have thus agreed that generally a union spokesman may be distinguished from managerial officials, for the latter's immediate power to alter working conditions raises a risk of subtle pressures during the voting process. The cases cited by the Company illustrate this distinction. See, *R.R. Donnelly & Sons Company*, 15 LRRM 192 (personnel manager who interviewed applicants for employment and resolved employee grievances); *Harry Manaster & Brothers*, 61 NLRB 1373 (same); *The Union Switch & Signal Company*, 76 NLRB 205, 211 (attorney for employer); *Parkway Lincoln-Mercury Sales, Inc.*, 84 NLRB 475 (no exceptions filed to Regional Director's finding that employer's vice president should not have acted as observer); *Herbert Men's Shop Corp.*, 100 NLRB 670, 671, 674-676 (managerial executive who represented employer in negotiations and resolved employee grievances); *International Stamping Co., Inc.*, 97 NLRB 921, 922-923 (president's son and sister-in-law, who improperly left voting area and checked off names of employees as they went to vote); *Peabody Engineering Co.*, 95 NLRB 952 (employer's attorney).[13]

The Supreme Court early made it clear that in representation proceedings, "the control of the elec-

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[13] The Board's practice, however, of not permitting persons closely identified with management to act as observers is not applied with the rigidity the Company suggests. The practice, for example, does not require invalidating an election where, even though the observer was a supervisor, his position in the employer's hierarchy and all the circumstances did not suggest management influence at the polls. *Plant City Welding & Tank Co.*, 119 NLRB 131, 132.

tion proceeding and the determination of the steps necessary to conduct the election were matters that Congress entrusted to the Board alone." *N.L.R.B.* v. *Waterman S.S. Corp.*, 309 U.S. 206, 226. The Company fell far short of meeting the burden of showing that the Board in the instant case abused its wide degree of discretion. *N.L.R.B.* v. *Mattison Machine Works*, 365 U.S. 123, 124; *Foreman & Clark, Inc.* v. *N.L.R.B.*, *supra*, 215 F. 2d at 409; *International Telephone & Telegraph Corp.* v. *N.L.R.B.*, 294 F. 2d 393, 395 (C.A. 9).

C. *The Board properly rejected the contention that summary judgment against the Company was improper*

As set forth *supra* pp. 3, 5-6, as required by the Act, the parties were accorded a pre-election hearing on such matters in dispute as the appropriate unit, and the Company was provided review by the Board of the Regional Director's unit determination. The Company's post-election objection was overruled by the Regional Director after the usual investigation; the Regional Director was affirmed on review by the Board. The Company made no charge, as it could not, that this latter procedure was improper. The election objection raised solely the propriety of a union official, an employee of another employer, acting as an observer. No contention was even made that this issue involved any factual dispute (R. 28-29, 34-35). Under long-approved principles, post-election issues are decided after administrative investigation, unless the objecting party can affirmatively show that substan-

tial and material issues of fact have been raised which can only be resolved at a hearing. "[T]he Act [does] not require such a hearing" (*N.L.R.B.* v. *J. R. Simplot*, 322 F. 2d 170, 172 (C.A. 9)), which is often requested solely as a " 'dilatory tactic . . . by employers or unions disappointed in the election returns . . .' " (*N.L.R.B.* v. *Sun Drug Co., supra*, 359 F. 2d at 414).

In order to obtain review of the representation determinations, the Company refused to recognize the election and certification. Upon the initiation of the complaint proceeding to test the certification, however, the representation and unfair labor practice proceedings "are really one" (*Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 158), and the Board need not permit relitigation of issues determined at the election stage absent a showing of newly discovered or previously unavailable material evidence. *Pittsburgh Plate Glass, supra*, 313 U.S. at 161-162. The Company made no such showing: its answer constituted a general denial of unlawful conduct (R. 58-59); its response to the order to show cause why summary judgment should not be granted merely contained an allegation that the Company "intends, as part of its defense, to offer at the hearing additional evidence which would bear upon its defense" (R. 75-76, 78). No offer was made of any specific evidence. The Company did "not suggest what new facts a hearing would develop or what if any evidence would be produced." *N.L.R.B.* v. *J. R. Simplot, supra*, 322 F. 2d at 172, quoted with approval: *N.L.R.B.* v.

National Survey Service, Inc., 361 F. 2d 199, 205 (C.A. 7); *Macomb Pottery Co.* v. *N.L.R.B.*, 376 F. 2d 450, 453 n. 4 (C.A. 7); *N.L.R.B.* v. *Tennessee Packers, Inc.*, 379 F. 2d 172, 178 (C.A. 6). This Court has recognized that, " 'If . . . an issue is to be relitigated in a subsequent unfair labor practice proceeding once it has been canvassed in a certification proceeding it is up to the party desiring to do so to indicate in some affirmative way that the evidence offered is more than cumulative.' " *N.L.R.B.* v. *Hadley, Inc.*, 322 F. 2d 281, 286 (C.A. 9). Accord: *N.L.R.B.* v. *Moss Amber Mfg. Co.*, *supra*, 264 F. 2d at 107; *N.L.R.B.* v. *Tennessee Packers, Inc.*, *supra*, 379 F. 2d at 179-180; *N.L.R.B.* v. *Douglas County Electric Membership Corp.*, 358 F. 2d 125, 129-130 (C.A. 5).

The Company, moreover, made little attempt to show that, despite its admitted refusal to recognize the Union, the Board could not find a violation of Section 8(a)(5) and (1) of the Act and enter a bargaining order upon which this Court could properly review the representation determinations. The gravamen of the Company's argument is that the Board has no authority to enter the order by way of a summary judgment. However, as in the federal district courts, the Board's summary judgment procedure "separate[s] what is formal, or pretended in denial or averment from what is genuine and substantial so that only the latter may subject a suitor to the burden of trial." 6 Moore, *Federal Practice*, para 56.15 (a) p. 2332 (2d. Ed.), quoting *Richard* v. *Credit*

Suisse, 242 N.Y. 346, 152 NE 110 (Cardozo, J.) An "opposing party, who has no countervailing evidence and who cannot show that any will be available at the trial, [is not] entitled to a . . . [trial] on the basis of a hope that such evidence will develop at the trial." 6 Moore *Federal Practice*, para. 56.15(3), p. 2343-2344. As stated by the Third Circuit (*N.L.R.B.* v. *Sun Drug Co.*, *supra*, 359 F. 2d at 415-416):

> Nor is an evidentiary hearing required to permit a party to ascertain whether there is a substantial and material question of fact or to focus attention on its view of the factual situation which has already been developed.

For, "due process does not require an evidentiary hearing as a prerequisite to a valid determination of a question of law." *N.L.R.B.* v. *Sun Drug Co., Inc.*, *supra*, 359 F. 2d at 415. As the Company's answer and its response to the motion for summary judgment established no evidentiary issue, the direction of a hearing "would serve only to permit argument which could as well [be] presented in the [response] itself." *N.L.R.B.* v. *National Survey Service*, *supra*, 361 F. 2d at 205.[14] Furthermore, using summary procedure serves an important statutory purpose by expeditously resolving the choice of bargaining repre-

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[14] In *Russell-Newman Mfg. Co.*, 158 NLRB 1260, the General Counsel's motion was denied only after the employer offered to adduce specific new evidence contrary to the facts found by the Regional Director in the representation proceeding. As shown, the Company made no such offer, and the Board held that *Russell-Newman* has no application here (R. 78, 86).

sentatives: "Time is a critical element in election cases." *N.L.R.B.* v. *Sun Drug Co., supra,* 359 F. 2d at 414.

The courts have, accordingly, uniformly approved the use of summary judgment in the circumstances presented here. *Acme Industrial Products, Inc.* v. *N.L.R.B.*, 373 F. 2d 530 (C.A. 3), enforcing *per curiam,* 158 NLRB 180; *Neuhoff Bros. Packers, Inc.* v. *N.L.R.B.*, 362 F. 2d 611, 613 (C.A. 5), cert. denied, 386 U.S. 956; *N.L.R.B.* v. *Tennessee Packers, Inc., supra,* 379 F. 2d at 176-177, 179-180; *N.L.R.B.* v. *National Survey Service, Inc., supra,* 361 F. 2d at 202, 208; *Macomb Pottery* v. *N.L.R.B., supra* 376 F. 2d at 452; *N.L.R.B.* v. *Jordan Bus Co.*, 380 F. 2d 219 (C.A. 10), enforcing 153 NLRB 1551. See 1 Davis, Administrative Law, Section 7.01 at 411 (West, 1958).[15] The courts have rejected the contention (see R. 76-77) that summary procedure is precluded by Section 10(b) of the Act, which provides that an unfair labor practice complaint shall be considered upon a hearing. As stated by the Seventh Circuit, "[Section] 10(b) cannot logically mean that an evidentiary

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[15] In *N.L.R.B.* v. *KVP Sutherland Paper Co.*, 356 F. 2d 671 (C.A. 6) the court held that in the circumstances relitigation of a unit determination should have been permitted and that summary judgment was improperly granted. In the court's view the employer had made a timely showing of a substantial and bona fide change in operations since the representation case which, as the Board has recognized, may warrant reconsidering a unit determination in the complaint proceeding. The Company made no such contention.

hearing must be held in a case where there is no issue of fact." *Macomb Pottery Co.* v. *N.L.R.B.*, *supra*, 376 F. 2d at 477.[16]

[16] The court in *Macomb* also rejected the argument (R. 76) that the Act contains no express authority for a summary judgment procedure and that, in any event, the procedure must be formulated by the Board's issuance of a formal rule. The Board's rules provide generally for pre-hearing motions (see, 29 C.F.R. Sec. 102.24) and that procedure was followed here. Cf. *N.L.R.B.* v. *Monsanto Chemical Co.*, 205 F. 2d 763, 764 (C.A. 8); *N.L.R.B.* v. *Peter Weber and Local 825, International Union of Operating Engineers, AFL-CIO*, —— F. 2d —— (C.A. 3), No. 16396, August 28, 1967 (66 LRRM 2049). Moreover, the motion for summary judgment plainly may, as here, be addressed to the Board directly. The Board is the decision making authority. See, *Warehousemen and Mail Order Employees, Local 743* v. *N.L.R.B.*, 302 F. 2d 865, 866, 869 (C.A.D.C.); 2 Davis, Administrative Law, Section 10.02 at 6-11 (West, 1958). While the Board usually delegates to a trial examiner the authority to conduct the proceeding and issue a recommended decision, the Board may consider the complaint directly (Section 10(b) and (c) of the Act, *infra*, p. 29; see also, 29 C.F.R. 102.50). The Company's claim to a right to a "Trial Examiner's decision" (R. 77, 85) is, in short, wholly without foundation. *N.L.R.B.* v. *Stocker Mfg. Co.*, 185 F. 2d 451 (C.A. 3). Compare, *Utica Mutual Life Insurance Co.* v. *Vincent*, 375 F. 2d 129, 132 (C.A. 2), cert. denied, —— U.S. ——.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should be entered enforcing the Board's order in full.

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CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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APPENDIX A

Pursuant to Rule 18(2)(f) of the Rules of this Court:

(Page references are to the stenographic transcript in Board Case No. 20-RC-6458, 20-RC-6462, and 20-RC-6463)

Board Case No. 20-CA-4016

Exhibits	For Identification	In Evidence
Board's:		
Nos. 1(a) through 1(h)	5	6
Employer's:		
No. 1	12	13
No. 2	13	14
No. 3	14	17
No. 4	17	18
No. 5	18	21
No. 6	21	22

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * *

Representatives and Elections

* * * *

[Sec. 9] (b) The Board shall decide in each case whether, in order to assure to employees the fullest

freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

* * * *

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

* * * *

Prevention of Unfair Labor Practices

* * * *

[Sec. 10] (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: . . . . The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint . . . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . . .

* * * *

[Sec. 10] (e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by

the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * * *

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